

DATED

DAY OF

DETAILED FACILITY STUDY AGREEMENT

BETWEEN

THE CUSTOMER SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT

-AND-

THE ESCO SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT

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**CROWN SOLICITOR
Level 9, 45 Pirie Street, Adelaide SA 5000**

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DETAILED FACILITY STUDY AGREEMENT

THIS AGREEMENT is made on the _____ day of _____

PARTIES:

BETWEEN

**THE CUSTOMER SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT
("CUSTOMER")**

AND

THE ESCO SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT ("ESCO")

BACKGROUND:

- A. The ESCO is on the pre-qualified list of ESCOs established by the Department of State Development for the supply of Energy Performance Contracting Services.
- B. The Customer has called for proposals from contractors as part of the Customer's review of the energy needs of the *Premises* specified in Schedule 2 to this Agreement in its Request for Proposal.
- C. The ESCO has submitted its Proposal, which appears as Schedule 6 to this Agreement, which has been accepted by the Customer pursuant to which the ESCO has agreed to undertake a Detailed Facility Study ("**DFS**") of the *Premises* on the terms of the Detailed Facility Study Agreement ("**DFS Agreement**").
- D. The parties have agreed that the DFS, subject to the terms and conditions contained in this Agreement, is to be conducted as a prerequisite to executing a proposed Energy Performance Contract ("**EPC**") for the *EPC Solutions* on the *Premises*, to be based upon the draft EPC attached to the Request for Proposal.

OPERATIVE PROVISIONS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following words have these meanings in this Agreement unless the contrary intention appears:

- 1.1.1 *Agreement* means this agreement and includes Schedules 1 to 7;

- 1.1.2 *Approvals* means the laws relating to the *Services*, the *EPC Solutions*, the *Premises* or the work under the *Agreement* (including the Building Code of Australia), relevant Standards Australia standards, and the lawful requirements of any person or authority having jurisdiction in connection with such matters;
- 1.1.3 *Business Day* means any day that is not a Saturday, Sunday or a public holiday in Adelaide;
- 1.1.4 *Commencement Date* means the date of execution of this Agreement;
- 1.1.5 *Confidential Information* means information disclosed by or on behalf of a party to this Agreement that:
- (a) is by its nature confidential or by the circumstances in which it is disclosed is confidential; or
 - (b) is designated by the disclosing party as confidential or identified in terms connoting its confidentiality, but does not include:
 - (c) this Agreement; or
 - (d) information which is or becomes public knowledge other than by a breach of this Agreement;
- 1.1.6 *Contracting and Official Records Standard* means the standard relating to records management amended by the Manager (Director), State Records pursuant to section 14(1) of the *State Records Act 1997* (SA) and which can be found at <http://www.archives.sa.gov.au>;
- 1.1.7 *Contract material* means all material used or brought into existence by either party as part of, or for the purpose of performing the *Services*, including but not limited to documents, equipment, information and data stored by any means including all intellectual property rights therein, but does not include computer software programmes or models owned, developed or used in a unique way by the ESCO in connection with the provision of the *Services* under this Agreement;
- 1.1.8 *Contractual Completion Date* means the date the ESCO completes and provides to the Customer the DFS or the Contractual Completion Date specified in the EPC, whichever is later;
- 1.1.9 *Core Business* means the core business undertaken by the Customer at the *Premises* as specified in Schedule 1;
- 1.1.10 *Customer's materials* means any documentation, information or material supplied by the Customer to the ESCO by whatever means whether for the purposes of the performance of this Agreement or otherwise;
- 1.1.11 *Customer's representative* means the person named in Item 8 of Schedule 1 or any other person substituted or additionally appointed to liaise with the ESCO or as notified in writing from time to time;
- 1.1.12 *DFS* means the detailed facility study report to be produced by the ESCO in accordance with this Agreement;

- 1.1.13 *DFS Fee* means the remuneration payable to the ESCO in accordance with Clause 5 in the amount specified in Item 1 of Schedule 1;
- 1.1.14 *ESCO's representative* means the person named in Item 9 of Schedule 1 or any other person substituted or additionally appointed to liaise with the Customer as notified in writing from time to time;
- 1.1.15 *Energy Cost Savings* has the meaning given to it in the EPC;
- 1.1.16 *EPC Solutions* means the energy conservation measures and other operational and environmental benefits proposed by the ESCO in its *Proposal*;
- 1.1.17 *EPC Solutions Works* means the work undertaken by the ESCO to install the EPC Solutions under the EPC.
- 1.1.18 *Future Developments* means possible changes to or impacting the *Premises* after the date of this Agreement, as identified by the *Customer* as part of the *Request for Proposals*;
- 1.1.19 *Good Industry Practice* means with the standard of skill and care to be expected of an experienced, professional service provider regularly undertaking services of the same or similar scope and complexity as the *Services*;
- 1.1.20 *Insolvency Administration* means in relation to an ESCO if a company:
- (a) an administrator is appointed to the ESCO or action is taken to make such an appointment;
 - (b) the ESCO resolves to be wound up;
 - (c) an application is made to a court for an order or an order is made that Party B be wound up (whether on grounds of insolvency or otherwise
 - (d) the ESCO ceases to carry on business;
 - (e) a receiver or a receiver and manager of property of the ESCOSA is appointed whether by a court or otherwise;
 - (f) an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of the ESCO or one of them is appointed, whether or not under an order;
 - (g) the ESCO enters into a compromise or arrangement with its creditors or a class of them; or
 - (h) the ESCO is or states that it is unable to pay its debts when they fall due.
- 1.1.21 *Insolvency Administration* means in relation to an ESCO that is a natural person:
- (a) the ESCO has committed an act of bankruptcy as contemplated by the *Bankruptcy Act 1966* (Cth);
 - (b) the ESCO is unable to pay his or her debts as and when they become due and payable;

- (c) the court has made a sequestration order against the ESCO's estate;
 - (d) a creditors' petition has been presented against the ESCO;
 - (e) the ESCO has presented to the Official Receiver a declaration of intention to present a debtor's petition;
 - (f) the ESCO becomes a bankrupt;
 - (g) a meeting of creditors of the ESCO is convened; or
 - (h) the ESCO lodges with his or her trustee a proposal to his or her creditors for a composition in satisfaction of his or her debts or a scheme of arrangement of his or her affairs;
- 1.1.22 *Intellectual property* means all rights in copyright, patents, registered and unregistered trademarks, registered designs, trade secrets and all other rights of intellectual property as recognised by the law in force from time to time in South Australia ;
- 1.1.23 *Liability Exceptions* means claims in respect of death or personal injury;
- 1.1.24 *Machinery of Government* means a change to the structure, function or operations of the South Australian Government or the Customer as a result of any government reorganisation, restructuring or other organisational or functional change;
- 1.1.25 *Premises* means the site(s) identified in Schedule 2 at which the Customer conducts its Core Business and in relation to which the Customer has issued its *Request for Proposal* and is inclusive of the existing equipment and systems on the said site(s).
- 1.1.26 *Proposal* means the expression of interest submitted to the Customer by the ESCO to perform the Services and/or Work required under the *Request for Proposal* as set out in Schedule 6;
- 1.1.27 *Request for Proposal* means the document(s) issued by the Customer to the ESCO for the purpose of obtaining the *Proposal* and which defines the scope of the Customer's requirements and describes the *Services* to be performed by the ESCO;
- 1.1.28 *Services* means those obligations of the ESCO described in Clauses 2 and 3 of this Agreement.
- 1.1.29 *Total Capital Cost* means the total cost of the Services including the fees and costs specified in clause 3.2.

1.2 Interpretation

The following rules of interpretation shall apply to this Agreement:

- 1.2.1 Reference to any person or to any party to this Agreement shall include that person's or party's legal personal representatives, executors, administrators, successors and permitted assigns.
- 1.2.2 Words importing the singular shall include the plural and vice versa and words importing any gender will include all genders.
- 1.2.3 Where the day on or by which any act, matter or thing is required to be done is a day other than a business day in the place in which the

act, matter or thing is to be done, such act, matter or thing shall be done on the next succeeding business day unless specifically provided for to the contrary in this Agreement.

- 1.2.4 Headings and underlinings are for convenience only and shall not affect the interpretation of this Agreement.
- 1.2.5 Where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of such word or phrase shall have a corresponding meaning.
- 1.2.6 References to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any orders, regulations, instruments or other subordinate legislation made under the relevant statute and further includes any equivalent statute in any other Australian state or territory where that state or territory has jurisdiction over this Agreement pursuant to the operation of Clause 14.
- 1.2.7 The word *person* means and includes any natural person, company, firm or any other legal entity whether acting as a trustee or not.
- 1.2.8 When a party comprises two or more persons, the rights and obligations of such persons pursuant to this Agreement shall have effect for the benefit of and bind all of them jointly and each of them severally.
- 1.2.9 A reference to dollars is to Australian dollars.

2. **ENGAGEMENT**

2.1 ESCO to provide *Services*

The Customer engages the ESCO to provide the *Services* in accordance with the terms and conditions of this Agreement and to prepare and submit the DFS to the Customer. Except to the extent expressly stated otherwise in this Agreement, the ESCO must perform the *Services* at its own cost and risk.

2.2 Objectives of the Detailed Facility Study

Subject to Clause 3 of this Agreement, the ESCO, in preparing and conducting the DFS, is to ensure the following:

- 2.2.1 provision of a full and detailed description of the energy consumption and facility operational characteristics of the Premises utilising the EPC Solutions that it proposes to install;
- 2.2.2 a detailed description of the Energy Cost Savings that the ESCO intends to deliver under the EPC between the parties; and
- 2.2.3 in so far as energy, operational and maintenance savings are concerned, establishment of a Measurement and Verification Plan (“MVP”) for guaranteeing and verifying savings from EPC Solutions in accordance with the document “Measurement and Verification Plan” attached at Schedule 7.

3. **ESCO’S OBLIGATIONS**

3.1 ESCO to provide *Services*

The ESCO must provide the Services in accordance with Good Industry Practice and document the results and outcomes of the provision of the Services in the DFS and must ensure that the DFS includes at least the following information:

- 3.1.1 a detailed description of those equipment, energy systems and other services or infrastructure in place at the Premises that will be impacted by the Services, their condition at the time of the DFS and their operating methods;
- 3.1.2 the energy consumption and demand profile and the space conditions of the facilities on the Premises;
- 3.1.3 a description of the EPC Solutions and improvements proposed by the ESCO, the cost of the installation of the EPC Solutions and improvements, the projected Internal Rate of Return for each site on the Premises and the impact of the proposed EPC Solutions and improvements on the energy consumption and demand profile of each site and on the space conditions of the facilities on the Premises. The description must address how the EPC Solutions respond to any Future Developments;
- 3.1.4 a brief description of the intended purpose of each of the modifications proposed by the ESCO to the equipment or systems and/or to the operating methods of the equipment or systems and to any other conditions of the facilities on the Premises;
- 3.1.5 a projection as to any changes in capacity of the existing equipment or systems due to the modifications or improvements contemplated;
- 3.1.6 an outline of training programmes or instruction required for the Customer's facilities managers and operators and summary of the involvement of facilities managers and operators likely to be necessary to affect the improvements;
- 3.1.7 reasoned estimated figures projected as the annual Energy Cost Savings which will result from the modifications or improvements together with details of how these figures are calculated and supported (including any assumptions upon which they are based), with performance criteria defined in terms of including, without limit, lumens, l/sec of air temperature;
- 3.1.8 a summary of the intended schedule for implementing the modifications and improvements including the timing and estimated duration of on-site work in respect of each distinct location or facility, taking into account the requirement to avoid interruptions to the Core Business;
- 3.1.9 an indication of altered or new operating or maintenance requirements which will apply due to implementation of the improvements and a reasoned estimate of the cost of any upgrading or maintenance work that the ESCO recommends to be undertaken prior to or during the implementation of the modifications/improvements in order to maximise their effect. Maintenance proposals should be prepared on the basis that the work is capable of being performed by third parties as well as by the ESCO;

- 3.1.10 a full description of all new equipment which is to be installed to effect the improvements together with an estimate of the expected lifetime of that new equipment, including engineering summaries and detailed equipment data sheets, expected maintenance and upgrade costs, as well as the effect its installation may have on the expected lifetime of the existing equipment or systems and a full description of the warranty and servicing arrangements which will apply to the existing equipment and to the new equipment installed ;
 - 3.1.11 establishment of a Measurement and Verification Plan as per Schedule 7 guaranteeing and verifying savings from EPC Solutions; and
 - 3.1.12 any adverse impacts of the EPC Solutions or the modifications proposed by the ESCO on the Core Business, the nature and extent of such impacts and strategies proposed by the ESCO to eliminate or mitigate such impacts.
- 3.2 DFS compliance
- The DFS must address and/or comply with:
- 3.2.1 Schedule 1;
 - 3.2.2 the DFS Scope Requirements set out in Schedule 2;
 - 3.2.3 the Operational Requirements Statement set out in Schedule 3; and
 - 3.2.4 the Requirements for Definition of Works Specification Obligations in Schedule 4.
- 3.3 ESCO calculations must meet certain benchmarks
- The ESCO must ensure that:
- 3.3.1 the maximum payback period will not exceed the period specified in Item 2 of Schedule 1;
 - 3.3.2 the minimum Energy Cost Savings identified in the DFS are at least
 - 3.3.3 the amount specified in Item 3 of Schedule 1; and
 - 3.3.4 the calculation of Total Capital Cost (for the purpose of calculating required simple payback period on capital expenditure) is to include:
 - (a) the DFS Fee;
 - (b) the measurement and verification costs over the life of the Agreement;
 - (c) associated operations and maintenance costs;
 - (d) but will not include the Customers own costs (unless agreed otherwise); and
 - (e) the proposed EPC Solutions and the other procedures specified in the DFS will not diminish or affect the effective operation of the Customer, its Core Business and its facilities on the Premises nor impede or diminish the effectiveness of existing operational projects.
- 3.4 Due Diligence
- The ESCO must:

- 3.4.1 diligently carry out all design obligations and programming, costings and other tasks necessary to complete the DFS in accordance with the Agreement and Good Industry Practice; and
 - 3.4.2 perform all other Services diligently, with all the skill and care expected as necessary for provision of such Services, and in accordance with all representations and warranties as to the ESCO's experience and ability expressly or impliedly made by reference to its Proposal and this Agreement, or by law.
- 3.5 During preparation of DFS
- During the preparation of the DFS, the ESCO must use best endeavours to satisfy itself as to the Customer's requirements for the DFS and the Services including by:
- 3.5.1 investigating the current condition, characteristics and use of all Premises and the operational requirements;
 - 3.5.2 consulting regularly with the Customer;
 - 3.5.3 informing the Customer in a timely manner of the information which the ESCO requests from the Customer; and
 - 3.5.4 investigating all Approvals required for the purposes of giving effect to the Services.
- 3.6 After DFS is provided to the Customer
- The ESCO shall, after providing the DFS to the Customer:
- 3.6.1 consult further with the Customer in relation to its requirements for the DFS and provide to the Customer any further revisions of the DFS as may be necessary to give effect to the results of that consultation; and
 - 3.6.2 provide to the Customer all further assistance, advice or information reasonably required by the Customer.
- 3.7 Timely Provision of *Services*
- The ESCO must perform the Services expeditiously and in accordance with the time limits, if any, specified in Item 4 of Schedule 1 ("**the Term**").
- 3.8 Customer's Materials
- The ESCO warrants that throughout the Term:
- 3.8.1 it will keep the Customer's materials secure and free from interference at all times and the ESCO hereby indemnifies the Customer for any liability the Customer may incur as a result of any breach of this clause;
 - 3.8.2 upon the completion or earlier termination of this Agreement, the ESCO must as soon as practicable return the Customer's Materials and the Contract material to the Customer; and
 - 3.8.3 neither Clause 3.8.1 nor Clause 3.8.2 shall be construed as prohibiting the ESCO from making and keeping a copy of the Contract material for its records.
- 3.9 Sub-contracting

- 3.9.1 The ESCO may not assign or sub-contract the performance of any part of the Services without the prior written consent of the Customer. (including as to terms).
 - 3.9.2 If requested by the Customer, the ESCO will provide to the Customer the names and addresses of any sub-contractors appointed by the ESCO.
 - 3.9.3 By sub-contracting any part or parts of the provision of the Services, the ESCO will not be relieved of any of its liabilities or obligations under this Agreement and as between the Customer and the ESCO will be entirely responsible for the acts or omissions of the subcontractor.
- 3.10 Statutory and Other Requirements
- 3.10.1 The ESCO must ensure that all work done in connection with the Services complies with all relevant Approvals.
 - 3.10.2 The ESCO must further ensure that all work done in connection with the Services complies with any policy and procedures of the Customer including regarding access to the Premises. The Customer must provide its relevant policy and procedures to the ESCO on or before the date of execution of this Agreement and provide any changes made from time to time as soon as reasonably practicable.
- 3.11 Conflict of Interest
- 3.11.1 The ESCO warrants that, as at the date of execution of this Agreement, it is not aware of any conflict of interest which would affect its ability to provide the Services in accordance with the terms and conditions of this Agreement.
 - 3.11.2 As soon as the ESCO becomes aware of the existence, or the possibility, of a conflict of interest, the ESCO must give written notice of this to the Customer, in which event the Customer reserves its rights under Clause 12.
- 3.12 Access to ESCO
- 3.12.1 Immediately upon receipt of reasonable notice from the Customer during the term of this Agreement, the ESCO must provide the Customer with access to the ESCO or the ESCO's Representative in order for the Customer to inspect, discuss or assess the status of the provision of the *Services*.

4. CUSTOMER'S OBLIGATIONS

4.1 Customer to co-operate

The Customer must co-operate with the ESCO in connection with the conduct and completion of the DFS by the ESCO and subject to Clause 3.10.2 undertakes to use reasonable endeavours to ensure that neither it nor any of its agents, servants, sub-contractors or employees shall unreasonably impede the ESCO in providing the *Services* in accordance with this Agreement.

4.2 Premises and Equipment

The Customer will ensure at all times that it is the owner or lessee of or otherwise lawfully entitled to occupy the Premises and the existing equipment and energy systems in place at the Premises during the Term.

4.3 Provide Information

4.3.1 Upon receipt of any reasonable request by the ESCO or otherwise as required by this Agreement the Customer must make available to the ESCO all relevant instructions, information, documentation, data or any other material which the ESCO reasonably requires to facilitate performance of the Services including, but not limited to:

- (a) subject to any confidentiality obligations, contracts for facilities management, maintenance, energy supply or other contracts that may impact on the provision of the Services;
- (b) all energy bills, tariff sheets and rate schedules, etc.; and
- (c) details of the operation of the Premises including hours of operation, floor areas, number of occupants and usage patterns.

4.3.2 Without limiting clause 4.4, the Customer does not warrant the accuracy of the Customer's materials and the ESCO is entirely responsible for verifying the accuracy or otherwise of such materials.

4.4 Errors and Misdescriptions

4.4.1 Subject to clause 4.4.2, the ESCO shall not be liable for any inaccuracies, errors or misdescriptions in its projections or other information contained in the DFS to the extent arising wholly or principally as a direct result of inaccuracies, errors or misdescriptions from the Customer's materials. Each Party shall be obliged to inform the other in the event that it is or becomes aware of any such inaccuracies in the Customer's materials.

4.4.2 Clause 4.4.1 does not apply to inaccuracies, errors or misdescriptions which the ESCO:

- (a) was aware of at the time of producing the DFS and has made allowance for, or which, exercising Good Industry Practice the ESCO should have been aware of and made due allowance for; or
- (b) has not taken reasonable steps, in accordance with Good Industry Practice, to investigate or verify.

5. FEES

5.1 Payment of DFS Fee upon satisfactory delivery of the *Services*

Subject to the provisions of Clauses 5.2 and 5.3 below, the Customer must pay to the ESCO the DFS Fee specified in Item 1 of Schedule 1 within one hundred and twenty (120) days of the delivery to it of the DFS by the ESCO **PROVIDED THAT** the Customer is satisfied that the ESCO has delivered the Services in accordance with the terms and conditions of this Agreement and that the DFS meets or exceeds the objectives set out in this Agreement, in the Proposal and the Request for Proposal, whether or not the parties proceed to execute an EPC.

5.2 DFS Fee to be incorporated in costs of any resultant EPC

5.2.1 Should the Customer wish to conclude an EPC following submission of the DFS, the Customer must notify the ESCO in writing within one hundred and twenty (120) days of its receipt of the DFS in which case payment of the DFS Fee will be deferred pending the conclusion of the EPC. The parties agree that the EPC will be in the form of the version annexed to the Deed, amended only to the extent necessary to complete the schedules to it with the technical and financial outputs developed as a result of the DFS. Except where the parties agree in writing, the parties must not otherwise seek to amend the EPC.

5.2.2 Provided the parties proceed to execution of an EPC:

- (a) the amount of the DFS Fee will be incorporated within the project costs associated with that EPC; and
- (b) payment of the DFS Fee will then be governed by the terms of the EPC as agreed between the parties.

5.3 Termination of Negotiations

Should the parties not proceed to execution of an EPC, the Customer shall pay the DFS Fee within thirty (30) days of the termination of negotiations as referred in Clause 5.2.1, such termination to be effected by notice in writing given by either party to the other party.

5.4 DFS or delivery of Services unsatisfactory

Subject to Clause 5.3, where the ESCO has failed to adequately deliver the Services as defined in this Agreement or the DFS fails to meet the objectives set out in this Agreement, the Proposal or the Request for Proposal, then the Customer may:

- 5.4.1 immediately terminate this Agreement without any liability arising on its part to make payment of the DFS Fee to the ESCO; or
- 5.4.2 instruct the ESCO to amend the DFS so as to adequately deliver the Services and/or meet the objectives set out in this Agreement, the Proposal or the Request for Proposal, in which case the ESCO shall be liable for payment of all costs of any work required to be done to rectify the DFS and the Customer shall be liable to pay no more than the DFS Fee specified in Item 1 of Schedule 1 upon the satisfactory rectification of the DFS and payment in accordance with Clause 5.1 shall not be required until the Customer determines that the Services have been satisfactorily provided.

6. VARIATIONS

6.1 Request

- 6.1.1 The Customer may at any time during the Term make a written request to the ESCO to vary the Services to be delivered pursuant to this Agreement.
- 6.1.2 The Services will only be varied if the ESCO is of the reasonable opinion that the requested variation will not substantially affect the

objectives originally agreed upon before the Agreement was executed.

6.2 Variation Fees

Any such variation that, in the reasonable opinion of the ESCO or the Customer, extends beyond or markedly reduces the objectives set out in Clause 2.2 or substantially broadens or narrows the scope of the Services required pursuant to Clause 3.1, shall entitle the ESCO or the Customer to renegotiate the DFS Fee payable pursuant to Clause 5.1 and the ESCO shall not be required to perform the variation until such time as the DFS Fee has been renegotiated.

6.3 Fee Payable

In the event that the parties cannot agree on the DFS Fee payable in respect of the variation, the Customer shall not thereby be entitled to terminate this Agreement unless or until a determination has been made pursuant to Clause 14.

7. ENTITLEMENT TO USE DATA CONTAINED IN THE DFS

7.1 Customer may make full use of DFS data

On or as soon as practicable after the expiration or earlier termination of this Agreement, the ESCO must deliver to the Customer all Contract material and the Customer's materials and the parties acknowledge that the Customer may make full use in any manner it chooses of the data contained in the DFS.

7.2 SCO retains intellectual property rights

7.2.1 The parties agree that the ESCO retains all Intellectual property rights it has in relation to all modelling software, other computer programmes, any equipment, materials, systems and any other document or thing used by it to generate the data incorporated in the DFS.

7.2.2 The parties agree that any Intellectual property in the reports that are generated by the ESCO in regards to the provision of the Services are owned by the Customer.

7.2.3 Without limiting the Customer's rights under clause 7.1, provided the parties proceed to execute an EPC, the ESCO must grant to the Customer a perpetual, irrevocable, non-exclusive, royalty-free licence to use any of the Intellectual property rights referred to in Clause 7.2.1. The licence is personal to the Customer and the Customer may not sublicense any of those property rights other than to the extent necessary to use the DFS for the purposes contemplated by the Request for Proposals for the Premises. The Customer will not seek to commercialise the use of these Intellectual property rights. Subject to the terms of the Request for Proposal, the licence is limited to the Premises and the Customer may not use the Intellectual property rights referred to in Clause 7.2.1 other than on or in relation to the Premises.

- 7.2.4 The Customer must not modify, copy, merge or reverse engineer the Intellectual property referred to in Clause 7.2.1 with any other software programme, equipment or material.
- (a) The ESCSO must ensure that in performing the Services and supplying the reports, it does not infringe the Intellectual property rights of any person.
 - (b) The ESCO must indemnify and keep the Customer indemnified against all costs, expenses and liabilities whatsoever arising out of or in connection with any claim that the performance of the Services and provision of reports by the ESCO, including without limit the Contract material, infringes the Intellectual property rights of any person.
 - (c) Where the Customer wishes to rely on this indemnity it must:
 - (i) give the ESCO written notice as soon as possible;
 - (ii) providing that the ESCO agrees to comply with the Customer's reasonable requirements for the handling of a claim, permit the ESCO, at the ESCO's expense, to handle all negotiations for settlement and, as permitted by law, to control and direct any litigation that may follow; and
 - (iii) provide all reasonable assistance to the ESCSO in the handling of any negotiations or litigation.
- 7.2.5 This clause will survive the expiry or termination of this Agreement.

8. CONFIDENTIALITY

- 8.1 The parties each agree not to disclose any Confidential Information to the other party disclosed pursuant to this Agreement without the prior written consent of the other party except where such information is:
- 8.1.1 publicly available other than through breach of this Agreement;
 - 8.1.2 lawfully known to the party to which it is disclosed;
 - 8.1.3 approved for release in writing by an authorised representative of the party owning the information;
 - 8.1.4 disclosed only to a party's employees, board members, auditors, insurers, lawyers, lenders or other persons having a legitimate reason to know such information;
 - 8.1.5 required by law to be disclosed;
 - 8.1.6 where disclosure is necessary to the performance of the Services by the ESCO;
 - 8.1.7 for the purposes of prosecuting or defending any legal proceedings.
- 8.2 ESCO acknowledges that the Customer may disclose Confidential Information:
- 8.2.1 to Parliament, the Governor, Cabinet or a Parliamentary or Cabinet committee or subcommittee;

- 8.2.2 to any agency, authority, instrumentality, Minister or Officer of the State of South Australia to whom it is customary for the Customer to disclose information such as the Confidential Information (whether or not the Customer is legally obliged to do so).
- 8.3 The Customer may disclose this Agreement and/or information in relation to this Agreement in either printed or electronic form and either generally to the public or to a particular person as a result of a specific request.
- 8.4 Nothing in this clause derogates from:
- 8.4.1 the Customer's obligations under any provisions of this Agreement; or
- 8.4.2 the provisions of the *Freedom of Information Act 1991 (SA)*.
- 8.5 The Customer acknowledges and consents to the use by the ESCO of any data and information relating to the energy consumption at the Premises, whether provided by the Customer or obtained by the ESCO, for the purposes of benchmarking and compilation of a national data base, or for the purposes of use of the ESCO as a reference or for any other internal purpose, but does not consent to the publication of any of this data or information for any purpose.
- 8.6 Nothing in this Agreement derogates from the powers of the Auditor-General under the *Public Finance and Audit Act 1987 (SA)*.
- 8.7 The obligations set out in this Clause 8 will survive the expiration or earlier termination of this Agreement.

9. **INSURANCE**

- 9.1 The ESCO must maintain in force at its own expense during the Term:
- 9.1.1 public risk and product liability insurance in the name of the ESCO for not less than the amount specified in Item 6 of Schedule 1 for any one event (and in the aggregate for products liability in any one policy period) or such other amount as the Customer may reasonably require;
- 9.1.2 professional indemnity insurance policy in the name of the ESCO for not less than the amount specified in Item 6 of Schedule 1 for any one event and in the aggregate in any one policy period or such other amount as the Customer may reasonably require;
- 9.1.3 workers compensation insurance in accordance with the applicable worker's compensation legislation.
- 9.2 The insurances to be maintained by the ESCO pursuant to this clause must be with insurers satisfactory to the Customer.
- 9.3 The ESCO will, without limiting the operation of clause 9.2, ensure that the insurance policy referred to in clause 9.1.2 is renewed and maintained for a period specified in Item 6 Schedule 1 from the date of termination or early expiration of this Agreement.
- 9.4 The Customer may require the ESCO to provide proof that the policies of insurance required by this clause have been effected and maintained.
- 9.5 The Customer in specifying levels of insurance in this Agreement accepts no liability for the completeness of their listings, the adequacy of the sum insured,

limit of liability, scope of coverage, conditions or exclusions of those insurances in respect to how they may or may not respond to any loss, damage or liability.

9.6 The ESCO acknowledges and agrees that it is its responsibility to assess and consider the risks and scope of insurances required under this Agreement.

9.7 This clause will survive the termination or expiry of this Agreement.

10. RECORDS

10.1 The ESCO must keep proper accounts, records (including information stored by computer and other devices) in relation to the DFS and Services and time sheets in accordance with accounting principles generally applied in relevant commercial practice in respect of its charges, fees and/or billing, and any disbursements payable pursuant to this Agreement ("**Records**").

10.2 The Customer may inspect the Records as soon as reasonably practicable after giving the ESCO written notice of this requirement.

10.3 The Customer must use all reasonable endeavours to minimise disruption to the ESCO whilst inspecting the Records.

10.4 The Customer may make copies of any Records required to be kept under this clause

11. TERMINATION

11.1 Termination Without Prejudice

The termination of this Agreement by either party shall be without prejudice to any accrued rights or remedies of each party including, without limiting the generality of this clause, the right of the ESCO to be paid in accordance with the terms of this Agreement.

11.2 Termination by the Customer other than for Default by the ESCO

The Customer may terminate the whole or any part of the performance of the DFS and Services at any time by giving written notice to the ESCO and, absent any default by the ESCO, the Customer must pay to the ESCO, within thirty (30) days of notice of termination being given, a pro rata portion of the DFS Fee equivalent to that proportion of the DFS and Services that have been completed as at the date of the notice of termination given in accordance with this Clause as established on an open book basis to the satisfaction of the Customer.

11.3 Termination by the Customer for Default by the ESCO

If the ESCO:

11.3.1 enters into Insolvency Administration;

11.3.2 subject to Clause 5.4, fails to carry out the Services with due diligence and competence which it fails to remedy to the Customer's satisfaction within 10 Business Days of written notice from the Customer to do so;

11.3.3 without reasonable cause, suspends or ceases to carry out the Services which it fails to remedy to the Customer's satisfaction within 10 Business Days of written notice from the Customer to do so; or

11.3.4 commits a material breach of this Agreement which it fails to remedy to the Customer's satisfaction within 10 Business Days of written notice from the Customer to do so;

then the Customer may forthwith terminate this Agreement by written notice served on the ESCO.

11.4 Termination by the ESCO

If the Customer:

11.4.1 fails to pay the ESCO in accordance with this Agreement which it fails to remedy to the ESCO's satisfaction within 10 Business Days of written notice from the ESCO to do so; or

11.4.2 commits a material breach of this Agreement which it fails to remedy to the ESCO's satisfaction within 10 Business Days of written notice from the ESCO to do so;

then the ESCO may forthwith terminate this Agreement by written notice served on the Customer.

11.5 ESCO Continuing Liability

Termination by the Customer in accordance with Clause 11.3 will not release the ESCO from liability in respect of any breach or non-performance by the ESCO of any its obligations pursuant to this Agreement.

12. **DISCONTINUANCE OF CUSTOMER**

Subject to any contrary legislative intention, the parties agree that if there is any Machinery of Government change that this Agreement is deemed to refer to the new entity succeeding or replacing the Customer and all of the Customer's rights and obligations under this Agreement will continue and will become rights and obligations of that new entity.

13. **GOVERNING LAW AND JURISDICTION**

This Agreement is to be governed by and construed in accordance with the laws applying in South Australia and the parties agree to submit to the exclusive jurisdiction of the courts of South Australia and of those courts competent to determine appeals from South Australian courts.

14. **DISPUTE RESOLUTION**

14.1 If any dispute arises under this Agreement, representatives of the parties must meet within five (5) Business Days of either party giving written notice of the dispute to the other party and attempt to resolve the dispute.

14.2 If any dispute is not resolved within ten (10) Business Days of the issue of a notice under Clause 14.1, or such longer period as may be agreed in writing between the parties, either party may refer the dispute to an appropriately qualified expert for determination. The nominated expert shall determine the

dispute as an expert and not as an arbitrator, and the process of determination shall not be a process of arbitration.

- 14.3 If the parties cannot agree on an expert within five (5) Business Days of a referral for expert determination pursuant to Clause 14.2, then either party may ask the Australian Commercial Disputes Centre to appoint an expert.
- 14.4 The parties shall each pay one half of the costs of any expert appointed under Clause 15.3 and the determination of the expert shall subject to manifest error of fact or error of law be final and binding on the parties. The procedures applying to any expert determination under the Agreement shall be as agreed between the parties, or, failing agreement, in accordance with the Expert Determination Guidelines of the Australian Commercial Disputes Centre.
- 14.5 Nothing in this Clause will prevent either party seeking urgent relief from a court (including, without limit, to restrain any breach of Intellectual property rights).

15. **INCONSISTENCIES**

- 15.1 If there are any inconsistencies between the Services to be provided and/or the terms and conditions for the provision of Services as detailed in this Agreement, the Request for Proposals and the Proposal then, to the extent of any inconsistency, the documents will be interpreted in the following order or precedence:
- 15.1.1 this Agreement;
- 15.1.2 Request for Proposal; then
- 15.1.3 the Proposal.

16. **WAIVER**

Neither delay in exercising any rights nor condoning or waiver of any breach of this Agreement on any one or more occasions shall be held or construed to be a waiver of any other subsequent or antecedent breach of this Agreement. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing and signed by the party giving notice of such waiver.

17. **NOTICES**

- 17.1 A notice:
- 17.1.1 may be given by an officer of the relevant party;
- 17.1.2 must be in writing;
- 17.1.3 may be delivered by hand, by prepaid ordinary post (airmail if outside Australia) or by facsimile; and
- 17.1.4 subject to Clause 18.3, must be sent to the address or facsimile number specified in Item 8 of Schedule 1.
- 17.2 A notice is deemed to be given:
- 17.2.1 if sent by hand, at the time of delivery;

- 17.2.2 if sent by letter, on the third (seventh if outside Australia) day after posting; and
 - 17.2.3 if sent by facsimile, at the time recorded on the transmission report, unless the transmission report indicates a faulty or incomplete transmission.
- 17.3 A party must notify the other party if it has changed its address or facsimile number and a party must send a notice to the other party's last notified address or facsimile number.
- 17.4 Compliance with Law
- The ESCO must, in performing its obligations under this Agreement, comply with all laws affecting or applicable to the provision of *Services* by the ESCO. Without limitation to the foregoing, the ESCO must comply with the provisions set out in Schedule 5.

18. MODIFICATION

This Agreement may not be modified, amended, added to or otherwise varied except by a document in writing signed by each of the parties.

19. TAXATION

- 19.1 Goods and Services Tax (GST)
- 19.1.1 The DFS Fee must include GST which may be applicable.
 - 19.1.2 Every invoice issued must be in the form of a valid Tax Invoice, or be accompanied by a valid Tax Invoice. No amount is payable under this Agreement until a valid GST Tax Invoice for the amount is received.
 - 19.1.3 If there is any abolition or reduction of any tax, duty, excise or statutory charge associated with the GST, or any change in the GST, the consideration payable for the supply must be varied so that the ESCO's net dollar margin in respect of the supply remains the same.
- 19.2 Tax Credits or Offsets
- If the Customer is required to reimburse the ESCO for any costs or other amount, despite any other provision of this Agreement, the Customer does not have to pay to the ESCO any sum included in that amount for which the ESCO can claim an Input Tax Credit or other like offset.
- 19.3 Definitions
- For the purposes of this clause GST means the goods and services tax under *the A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and the terms Tax Invoice and Input Tax Credit have the meaning under the said Act.

20. CUSTOMER RECORDS

The ESCO agrees that in performing its obligations under this Agreement it will act in a manner that ensures that the Customer is able to comply with the Contracting and Official Records Standard.

21. EQUAL OPPORTUNITY

The ESCO must, if it is a relevant employer within the meaning of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) comply with its obligations under that Act, and use its best endeavours to ensure that any sub-contractor, consultant or supplier who is a relevant employer complies with its obligations under that Act.

22. WORK HEALTH AND SAFETY

22.1 General

The ESCO must comply with all statutory requirements, including the *Work Health and Safety Act 2012* (SA) and *Work Health and Safety Regulations 2012* (SA).

22.2 The ESCO shall in respect of the Services:

22.2.1 implement and maintain work practices and systems to ensure safe systems of work on the Premises;

22.2.2 ensure that the work carried out by the ESCO and the work of any and all other persons on the Premises and the respective safety procedures and systems of the ESCO and others, are co-ordinated by the ESCO so as to ensure safety;

22.2.3 undertake an auditing process of the workplace on a regular basis to ensure that safe systems of work are maintained on the Premises;

22.2.4 implement and maintain an effective process of identifying actual or potential hazardous or unsafe or unhealthy conditions at the Premises, assessing associated risks and identifying and implementing appropriate risk control and prevention measures;

22.2.5 implement and maintain an appropriate incident investigation process and designate responsibility for investigation to persons with appropriate skills;

22.2.6 implement and maintain a system to manage work health and safety risks with respect to employees, subcontractors. and other persons who may attend the Premises;

22.2.7 implement an emergency response procedure for responding to work health and safety incidents at the Premises; and

22.2.8 comply with any induction program as may be required by the Customer.

22.3 The ESCO must instruct its employees, agents and subcontractors to:

22.3.1 follow safe work practices and procedures (including occupational health and safety policy, site safety action plan and protocol and induction and training programs) at all times;

22.3.2 take reasonable care for their own safety; and

22.3.3 take reasonable care for the health and safety of anyone else who may be affected by anything that they do or fail to do, in connection with the work under the Agreement.

23. INDUSTRY PARTICIPATION POLICY

Option (a) where an IPP (Tailored) Plan was submitted with the ESCO's tender.
Delete option (b) below.

23.1 The ESCO must provide an Industry Participation Report (IPP Report) in respect of each Industry Participation Reporting Period within two weeks of the end of each period, in the format set out in the IPP (Tailored) Plan Implementation Report template which is attached to the Contract, including all the information indicated in that template.

23.2 The Industry Participation Reporting Period is:

23.2.1 the period between the Date of Contract and the date six (6) months after the Commencement Date;

23.2.2 each subsequent six (6) month period during the term of the Agreement;

23.2.3 the Contractual Completion Date..

Option (b) where an IPP (Standard) Plan was submitted with the ESCO's tender.
Delete option (a) above.

23.3 The ESCO must provide an Industry Participation Report (IPP Report) in respect of each Industry Participation Reporting Period within two weeks of the end of each period, in the format set out in the IPP (Standard) Plan Implementation Report template which is attached to the Contract, including all the information indicated in that template.

23.4 The Industry Participation Reporting Period is:

23.4.1 the period between the Commencement Date and the first anniversary of the Commencement Date;

23.4.2 each subsequent 12 month period during the term of the Agreement;

23.4.3 the Contractual Completion Date.

23.5 The ESCO must attend any meeting scheduled by the Industry Participation Advocate during the term of the Contract to review how the ESCO's Industry Participation Plan is being implemented and advanced, and for this purpose, the ESCO must provide all information reasonably requested by the IPA. The IPA must give the ESCO not less than ten (10) Business Days' notice of any such meeting.

23.6 The ESCO's failure to comply, in whole or in part, with the commitments contained within the ESCO's Industry Participation Plan may be a factor taken into account in the award of future contracts for the Government of South Australia.

23.7 In this clause, 'Industry Participation Advocate' or 'IPA' means the person who from time to time has been appointed to the position of Industry Participation Advocate within the Office of the Industry Advocate, situated within the Department of the Premier and Cabinet, or his/her successor.